

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Nicole
Sanders of the Order of Temporary
Immediate Suspension

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on February 2, 2018. The hearing record closed on Wednesday, May 23, 2018, following the receipt of six recordings made by County investigators in this matter.

Grace C. Song, Assistant Attorney General, appeared on behalf of the Hennepin County Human Services and Public Health Department and the Minnesota Department of Human Services (Department). Arthur R. Martinez, The Law Office of Arthur R. Martinez, P.A., appeared on behalf of the Licensee, Nicole Sanders.

STATEMENT OF THE ISSUES

1. Did the Department demonstrate that reasonable cause exists to believe that Ms. Sanders' actions, or conditions in the program, posed an imminent risk of harm to the health, safety, or rights of persons served by her child care program?
2. If so, did Ms. Sanders establish that conditions in the program do not now pose an imminent risk of harm, such that the daycare should be permitted to resume operations?

SUMMARY OF RECOMMENDATION

While the source of the injuries to E.S., a child who was enrolled in Ms. Sanders' day care, was not firmly established during the evidentiary hearing, the Department did demonstrate that it had reasonable cause to believe that E.S. was injured as a result of being struck in the face by Ms. Sanders. Under our law's reasonableness standard, there is sufficient cause for the Department to believe that Ms. Sanders' actions pose an imminent risk of harm to the health, safety, or rights of persons served by the program. In these circumstances, the Commissioner should maintain the Order of Temporary Immediate Suspension until a thorough investigation can be completed.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Sanders operates a family child care program from her family's home in Minnetonka, Minnesota. She has run her own, in-home child care for 12 years and holds License Number 1041449-RO2 from the Department.¹

2. Under her license, Ms. Sanders is permitted to care for a total of 12 children, provided that no more than ten of those children are less than school age, no more than two of those children are infants and toddlers, and no more than one infant is in care at any particular time.²

3. In mid-March of 2018, Ms. Sanders had six children in care, including a four-year-old girl, E.S.³

4. E.S lives with her father, B.S., her mother, L.S., and her younger sister.⁴

5. At this time, E.S., like other girls her age, could communicate her needs verbally to adults and was generally independent in toileting.⁵

6. On the afternoon of Wednesday, March 14, 2018, L.S. retrieved her daughter from the Sanders day care and transported her home.⁶

7. Shortly after the two arrived home, E.S. reported to her mother that she had been slapped in the face by Ms. Sanders earlier in the day. E.S. recounted to her mother that she woke up during the scheduled naptime because she had soiled herself and needed to go to the bathroom. E.S. maintained that on her way to the bathroom she was stopped by Ms. Sanders and was told to resume her nap. E.S. said that Ms. Sanders did not believe that E.S. needed to go to the bathroom and slapped the girl as a punishment for lying.⁷

8. E.S.'s mother examined the girl's face and found a purplish crescent-shaped bruise that extended from E.S.'s left ear to the creases of her mouth. Using her smartphone, E.S.'s mother took a series of digital photographs of E.S.'s face.⁸

9. The digital photographs were then transmitted by E.S.'s mother from her smartphone to B.S.⁹

10. On Thursday, March 15, 2018, B.S. telephoned Ms. Sanders as part of an effort to learn more about how E.S. might have obtained the bruise on her face.

¹ Exhibits (Ex.) 1, 2, 18; Testimony (Test.) of Nicole Sanders.

² Test. of Cassandra Dutrieuille; Minn. R. 9502.0367 (C)(2) (2017).

³ Ex.18; Test. of N. Sanders.

⁴ Ex. 15; Test. of B.S.

⁵ *Id.*

⁶ Exs. 15, 19.

⁷ Ex. 15; Test. of B.S.; *see also* Ex. 18.

⁸ Exs. 13, 15; Test. of B.S.

⁹ Test. of B.S.

However, the two did not speak by telephone until the morning of Friday, March 16, 2018.¹⁰

11. During that conversation, Ms. Sanders maintained that during the scheduled nap time on Wednesday, she was in the upstairs kitchen of the day care home when she heard E.S. loudly cry in the lower level family room where the day care children were napping. She explained that as she ran down the stairway to the family room below, she missed a step on the staircase and fell. Sanders stated that as she tumbled forward she collided into E.S. and both landed on the carpeted floor below. Ms. Sanders maintained further that while E.S. was upset because she awoke with soiled underpants, she did not appear to have been impacted by the collision with Sanders. Moreover, Ms. Sanders noted that she did not mention the incident to L.S., when L.S. retrieved E.S. later that afternoon, because E.S. did not show any signs of an injury.¹¹

12. When asked about the apparent bruising to E.S.'s face, Ms. Sanders speculated that her hand could have touched E.S.'s face during the collision or that the bruising could have resulted from an injury on playground equipment at the day care.¹²

13. On March 16, 2018, the Common Entry Point of Hennepin County's Human Services and Public Health Department received a report of suspected maltreatment of the child. The reporter maintained that E.S., a child enrolled in the Sanders day care program, had received injuries after being slapped in the face by Ms. Sanders.¹³

14. On March 19, 2018, Andrew Larson, a Child Protection Investigator for Hennepin County was assigned to investigate the claim of possible maltreatment. As part of his investigation he interviewed E.S., B.S., L.S., and Ms. Sanders.¹⁴

15. Additionally, Mr. Lawson obtained copies of the digital photographs taken of E.S. by her mother. On April 3, 2018, Mr. Larson remitted copies of these photographs to Dr. Nancy Harper, the Director of the Center for Safe and Healthy Children at the University of Minnesota. As part of the transmittal, Mr. Larson inquired: "In your estimation would an accident as reported by the day care provider, cause such an injury or does this appear more like what the child reported, a deliberate slap?"¹⁵

16. Within a few hours, Dr. Harper replied to Mr. Lawson's inquiry. She stated:

My opinion of course is limited to the two images and also limited by not having the date/time of these images in relationship to when . . . the

¹⁰ Ex. 19; Test. of B.S.; Test. of N. Sanders.

¹¹ Ex. 19; *see also* Ex. B at 5-6; Minn. R. 9502.0375, subp. 2(D) (2017) ("The provider shall inform the agency . . . immediately after the occurrence of any serious injury or death of a child within the day care residence. A serious injury is one that is treated by a physician.").

¹² Ex. 19.

¹³ Ex. at 3; Ex. 4 at 1.

¹⁴ Exs. 14, 15, 16, 17, 18; Test. of A. Larson.

¹⁵ Ex. 5.

reported fall occurred. That said, these pictures demonstrate a patterned injury (linear or line-like) on the cheek. Both an injury to the cheek is unusual in an active child as well as a linear injury (unless a child struck an edge of an object). Furthermore, in the second image ending in 200929 there are two linear red-purple contusions which is most consistent with a direct impact from a hand.¹⁶

17. Based upon this assessment, Mr. Larson determined that Ms. Sanders had maltreated E.S., the maltreatment was serious, and that this misconduct disqualified Ms. Sanders from providing direct contact services in a licensed program.¹⁷

18. Following the receipt of the maltreatment determination, and the development of an accompanying risk of harm analysis, Cassandra Dutrieuille, Quality Assurance Supervisor with Hennepin County, recommended that the Department issue an Order of Temporary Immediate Suspension.¹⁸

19. On April 5, 2018, the Department issued the requested order temporarily suspending Ms. Sanders' day care operation.¹⁹

20. Ms. Sanders timely appealed the suspension order by way of correspondence dated April 6, 2018.²⁰

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services (Commissioner) have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.08 (2016).

2. Hennepin County and the Department have complied with all of the substantive and procedural requirements of law and rule.

3. The Commissioner shall impose a temporary immediate suspension of a child care license "[i]f the license holder's actions or failure to comply with applicable law or rule . . . pose an imminent risk of harm to the health, safety, or rights of persons served by the program."²¹

4. A temporary immediate suspension shall "remain in effect pending the Commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension" if the Commissioner demonstrates "that reasonable cause exists to believe that the license holder's actions

¹⁶ *Id.*

¹⁷ Ex. 6; Test. of A. Larson.

¹⁸ Exs. 6, 7, 8, 9; Test. of C. Dutrieuille.

¹⁹ Ex. 1.

²⁰ Notice and Order for Hearing, OAH Docket No. 8-1801-35191 at 2 (April 9, 2018).

²¹ Minn. Stat. § 245A.07, subd. 2 (2016).

or failure to comply with applicable law or rule poses . . . an imminent risk of harm to the health, safety, or rights of persons served by the program.”²²

5. “Reasonable cause” means that there are specific articulable facts or circumstances which provide the Commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.²³

6. “Imminent danger” means a child or vulnerable adult is threatened with immediate and present abuse or neglect that is life-threatening or likely to result in abandonment, sexual abuse, or serious physical injury.²⁴

7. The record does include specific articulable facts that would lead the Commissioner to reasonably suspect that the daycare children are threatened with immediate and serious physical injury.²⁵

8. While the medical opinion rendered by Dr. Harper in her message to Mr. Larson is an out-of-court statement offered for the truth of the matters asserted – namely that the “two linear red-purple contusions [on E.S.’s face were] most consistent with a direct impact from a hand” – such a message is “the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. . . .”²⁶ This assessment, while rendered out-of-court, is written and signed; from a declarant without apparent interest or bias; that details the basis for her conclusion; and was disclosed to Ms. Sanders sufficiently in advance of the evidentiary hearing.²⁷

9. Such an assessment is properly included in the hearing record²⁸ and would lead the Commissioner to reasonably suspect that the daycare children are threatened with immediate and serious physical injury.²⁹

²² Minn. Stat. § 245A.07, subd. 2a (a).

²³ *Id.*

²⁴ Minn. R. 9543.0020, subp. 11 (2017).

²⁵ See Minn. Stat. § 245A.07, subd. 2a (a).

²⁶ See Exs. 15, 13; Minn. R. 1400.7300, subd. 1 (2017)

²⁷ See *In Re Residential Building Contractor's License of Capricorn Corp.*, OAH Docket No. 11-1005-11089-2, 1998 WL 177725, slip op. at *11 (Minn. Office Admin. Hearings February 17, 1998) (citing *Indus. Claims Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13, 18 (Colo. 1989))

²⁸ *In The Matter of the Revocation of the Child Foster Care License of Tashonda Williamson and the Maltreatment Determination and Disqualification of Tashonda Williamson*, 2017 WL 1537344, at *6 (“[Ms.] Otanez consulted Dr. Mark Hudson of the Midwest Children’s Resource Center to obtain his opinion on the injury to S.M.’s cheek, emailing him pictures she took of S.M.’s face. Dr. Hudson opined that a two-year-old could have caused the mark, responding: ‘Pretty non-specific. Could be an old scratch/minor cut from any number of things in a mobile kid. Unless there was some specific history to say it was inflicted.’”); accord, *In The Matter of the Revocation of the Family Foster Care License of Terri Hartline*, 2003 WL 21634061, at *7; *In Re the Immediate Suspension of the License of Theresa Read*, 2000 WL 667104, at *2.

²⁹ See *In Re the Immediate Suspension of the License of Theresa Read*, *supra*, at *2, 4.

10. Reasonably grounded claims of inappropriate use of corporal punishment by a daycare provider are a proper bases for an Order of Temporary Immediate Suspension.³⁰

11. Minn. R. 9502.0375, subd. 2 states in part that “[t]he provider shall inform the agency . . . immediately after the occurrence of any serious injury . . . of a child within the day care residence. A serious injury is one that is treated by a physician.”

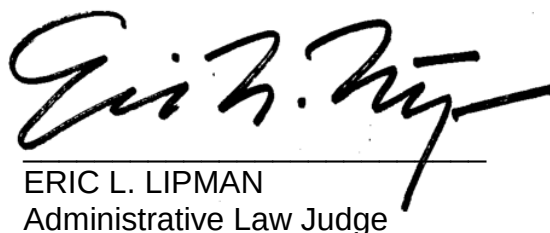
12. The record does not include evidence that Ms. Sanders was on notice that E.S. received treatment by a physician, or reasonably needed such services, on March 14, 2018.

Based upon the Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Commissioner should **AFFIRM** the Order of Temporary Immediate Suspension of the Family Child Care License of Nicole Sanders (Number 1041449-R02).

Dated: June 1, 2018



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions of Law, and Recommendation. The parties have ten calendar days after receiving this Report to file exceptions to the Report. At the end of the exceptions period, the record will close. The Commissioner then has ten working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, P.O. Box 64998, St. Paul, MN 55164, (651) 431-4319, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1 (2016), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

³⁰ See, e.g., *In the Matter of the Temporary Immediate Suspension of Tammy Petzel and Tracy Kehr*, 2017 WL 5661802, at *6.

MEMORANDUM

I. Regulatory Standards

Minn. Stat. § 245A.07, subds. 2(a) and 2a, set forth the standard of proof that must be met to sustain a temporary immediate suspension order. The statute reads in part:

The commissioner shall act immediately to temporarily suspend the license if . . . the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program. . . .

. . .

The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension. For suspensions under subdivision 2, paragraph (a), clause (1), the burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses, or the actions of other individuals or conditions in the program poses an imminent risk of harm to the health, safety, or rights of persons served by the program. 'Reasonable cause' means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.

These are modest standards, intended to assure that children are protected until there can be a more complete investigation, a complete evidentiary hearing (if one is needed) and a final determination.

If the commissioner demonstrates that reasonable cause for the issuance of the suspension order, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules that the Commissioner alleges were violated, at the time that the Commissioner alleges the violations of law or rules occurred.³¹

The Administrative Law Judge must also determine if the evidence shows that the license holder's actions, at the time of the hearing, continue to pose an imminent risk of harm.³² This determination is made so as to inform the Commissioner as to

³¹ See Minn. Stat. § 245A.08, subd. 3 (a).

³² See *In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Angie Mattison*, 2016 WL 2946022, slip op. at *3 (Minn. Ct. App. May 23, 2016) (unpublished).

whether the suspension should continue pending final determination of any appropriate licensing sanction.³³

II. Analysis

In the view of the Administrative Law Judge, there are three possibilities of how E.S. could have obtained a “patterned injury (linear or line-like) on the cheek” on Wednesday, March 14, 2018. E.S. could have been injured: (1) by being struck by Ms. Sanders; (2) during a collision with Ms. Sanders near the entrance into the family room; or (3) by hitting the surface of playground equipment at the day care home.

At this stage of the proceeding, the law requires only that the Department show that its theory of the case is not fanciful and that it has reasonable cause to believe that children are imminently at risk. The Department’s version of events need not be the best explanation of events, or the only possible explanation; it simply must be a conclusion that could be drawn by a reasonable government official. The Department has met this modest burden.

Ms. Sanders had a more difficult challenge – to establish that she was in full compliance with the behavior guidance rules (including the ban on corporal punishment)³⁴ on March 14, 2018. In essence, she was called upon to “prove the negative;” that she did not violate the behavior guidance rules on that day. Because, at this preliminary stage of the licensing proceedings, the uncertainties in the hearing record run against her defense and terminating the suspension order. For now, it is appropriate to maintain the suspension order while the investigation into these events continues.

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³³ Minn. Stat. § 245A.07, subd. 2a(a) (“The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3”).

³⁴ Minn. R. 9502.0395, subp. 2 (A) (2017).